In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 493

ALBERT SNYDER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on June 23, 1969. A petition for rehearing was denied on July 23, 1969. The petition for a writ of certiorari was filed on August 22, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether petitioner, subpoenaed for a day certain as a witness in a criminal trial but allowed to remain on call, was properly held in criminal contempt for

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having willfully absented himself after being informed of the date to which the case had been continued.

RULE INVOLVED

Rule 17(g), F.R. Crim. P., provides:

> Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court from which the subpoena issued or of the court for the district in which it issued if it was issued by a commissioner.

STATEMENT

Following a court trial under Rule 42(b), F.R. Cr. P., in the United States District Court for the Central District of California, petitioner was convicted of contempt of court, 18 U.S.C. 401 (see Pet. 2–3), and was sentenced to imprisonment for a period of six months (2 R. 7, 33, 150). The court of appeals affirmed (Pet. App. A).

On February 15, 1968, petitioner was served with a subpoena to appear as a witness in the trial of *United States* v. *Gebhard*, set for trial in the above-named court on February 20, 1968 (2 R. 30). Shortly thereafter, petitioner and his attorney, Bruce I. Hochman, met in the United States Attorney's office with the Assistant United States Attorney in charge of the case. In view of the anticipated length of the trial and for the convenience of petitioner, Hochman requested that petitioner be excused from appearing on February 20 and suggested instead that he be "on call" for such time as his testimony would be required.

The assistant agreed (2 R. 37, 41–43, 50).[1] At the request of defense counsel, the case was thereafter continued on three occasions. Hochman discussed the continuances with petitioner (2 R. 79–81), and on March 5, petitioner and Hochman also discussed with government counsel petitioner's testimony and the arrangements for calling him (2 R. 45, 48–51).

On March 14, 1968, the Assistant United States Attorney sent petitioner a telegram, in care of Hochman, telling him that the case had been re-set for April 9, 1968, and advising petitioner that he must be present on that date unless prior arrangements were made with the office of the United States Attorney. Hochman read the telegram to petitioner, then called the assistant and agreed that petitioner should continue to be on call for the trial commencing on April 9 (2 R. 51–56, 61).

About April 4, Hochman tried to reach petitioner by telephone and was told that petitioner's telephone had been disconnected. His further efforts to reach petitioner were unsuccessful (2 R. 64–73). A material witness warrant was issued for petitioner on April 5. On April 18, petitioner was called as a witness in the trial and failed to appear. The trial court issued a bench warrant for his arrest (2 R. 31), and petitioner was arrested in New Jersey on May 8, after the trial was over. Investigation showed that during the trial he had been in El Paso, Chicago and Philadelphia, under assumed names (2 R. 88–91).

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[1] Petitioner was familiar with such arrangements, which had been made for him before the grand jury in this same matter (2 R. 44, 46).

ARGUMENT

Petitioner seeks review on the ground that the decision of the court of appeals is in conflict with the decision of this Court in *Blackmer* v. *United States*, 284 U.S. 421, upon which the court of appeals relied, but which petitioner claims it misconstrued. In *Blackmer*, this Court held that a person subpoenaed as a witness to appear on April 2 was not excused merely because the trial did not begin until April 9. It is true, as the court of appeals here pointed out (Pet. App. A–2), that the subpoena in *Blackmer* specified in accordance with the language of the then existing predecessor statute to Rule 17, F.R. Cr. P., that the witness was "not to depart the court without leave thereof, or of the district attorney." Although the quoted language was not carried over into Rule 17, the Notes of the Advisory Committee on Rules indicate no intention to change existing law. 18 U.S.C.A. Rule 17, Federal Rules of Criminal Procedure; *In re Germann*, 262 F. Supp. 707, 709–710 (D.C. S.D.N.Y.), affirmed, *United States* v. *Germann*, 370 F. 2d 1019, 1022 (C.A. 2), vacated for reconsideration in light of original petitioner's death, *Germann* v. *United States*, 389 U.S. 329; *Taylor* v. *United States*, 221 F. 2d 809 (C.A. 6), certiorari denied, 350 U.S. 834; cf. *Kenyon* v. *Automatic Instrument Co.*, 10 F.R.D. 248 (D.C. W.D. Mich.), affirmed, 186 F. 2d 752 (C.A. 6), certiorari denied, 342 U.S. 820.

Petitioner, however, does not rely solely on the deletion from Rule 17 of the language quoted above. Rather he claims that the instant case is distinguishable from *Blackmer* on its facts. In *Blackmer*, he

urges, the prospective witness never responded to the subpoena, whereas here he did respond and obtained an agreement that he would remain on call. According to petitioner, the agreement to remain on call supplanted and superseded the subpoena and altogether excused petitioner from attending the trial. (Pet. 8–10).

In fact, the agreement that petitioner should remain on call did not by any means eliminate the continued duty to attend court, which duty petitioner concedes to have resulted from the subpoena. To the extent that the agreement between petitioner and the Assistant United States Attorney modified the subpoena at all, it merely excused petitioner's appearance until notified by government counsel. Implicit in the agreement to remain "on call," by definition, was petitioner's assurance that he would be available to appear when notified, and that he would not make it impossible to receive notification by absconding from the jurisdiction and avoiding communication not only with the court and with the United States Attorney, but also with his own counsel. By willfully violating his agreement with the assistant who allowed petitioner to remain on call until his testimony was required, petitioner cannot be held to have succeeded in avoiding the force of a valid subpoena. As this Court has noted before, a subpoena is not a game of "hare and hounds," in which the witness must testify only if cornered at the end of the chase. *United States* v. *Bryan*, 339 U.S. 323, 331.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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Solicitor General.

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SEPTEMBER 1969.

U.S. GOVERNMENT PRINTING OFFICE: 1969